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No. 98-9537

In the Supreme Court of the United States

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

54 pp

QUESTION PRESENTED

Whether the court of appeals properly declined to address two of petitioner's three claims of error on the ground that petitioner had failed to present those claims to the Social Security Administration's Appeals Council.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 85-86) is reported at 200 F.3d 229. The judgment of the district court (J.A. 83-84) is unreported. The report and recommendation of the magistrate judge (J.A. 74-82) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1998. A petition for rehearing was denied on February 18, 1999 (J.A. 87). The petition for a writ of certiorari was filed on May 19, 1999, and was granted on November 29, 1999. 120 S. Ct. 525 (J.A. 88). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 301 *et seq.* (Act), provides for the payment of monthly benefits to disabled persons who have contributed to the program. 42 U.S.C. 401-433 (1994 & Supp. III 1997). Title XVI of the Act provides for the payment of disability benefits to certain indigent persons under the Supplemental Security Income Program. 42 U.S.C. 1382 (1994 & Supp. III 1997). The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A). The Commissioner of Social Security[1] has promulgated detailed regulations governing both the substantive standards to be applied in determining eligibility under the program, and the procedures for adjudicating individual disability claims.

a. The substantive standards for determining whether an adult person is disabled are embodied in a five-step sequential evaluation process. See 20 C.F.R. 404.1520-404.1576.[2] As this Court explained in *Sullivan* v. *Zebley*, 493 U.S. 521 (1990):

[1] The Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476, transferred the administration of the Social Security program from the Secretary of Health and Human Services to the Commissioner of Social Security.

[2] The regulations discussed in the text are applicable to the Title II disability program. The parallel regulations governing the Title XVI program appear at 20 C.F.R. 416.920-416.976.

> The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. [20 C.F.R. 404.1520(b) and (c).] In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. [20 C.F.R. Pt. 404, Subpt. P, App. 1 (Pt. A).] If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. [20 C.F.R. 404.1520(d).] If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. [20 C.F.R. 404.1520(e) and (f).]

Id. at 525-526; see also *Bowen* v. *Yuckert*, 482 U.S. 137, 141-142 (1987).

b. "To facilitate the orderly and sympathetic administration of the disability program of Title II, the [Commissioner] and Congress have established an unusually protective [administrative] process for the review and adjudication of disputed claims." *Heckler* v. *Day*, 467 U.S. 104, 106 (1984); see also *id.* at 106-107 (describing administrative scheme); *Yuckert*, 482 U.S. at 142 (same); *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986) (same); 20 C.F.R. 404.900 (same).[3] If it is determined at any stage of the process that the individ-

[3] The parallel procedural regulations governing adjudication of Title XVI claims appear at 20 C.F.R. 416.903, 416.1400 *et seq.*

ual is eligible for benefits, he is entitled to retroactive payments for the period of his eligibility, beginning no more than 12 months prior to the filing of the application for benefits. *Schweiker* v. *Hansen*, 450 U.S. 785, 786-787 (1981). See also *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976) (termination of benefits).

The initial determination whether a particular individual is eligible for disability benefits is made by a state agency, acting under the authority of the Commissioner. 42 U.S.C. 421(a); 20 C.F.R. 404.1503. If the state agency makes an initial determination that the applicant is not disabled, the individual may request a de novo reconsideration by the state agency. 20 C.F.R. 404.904, 404.907-404.921.[4] If the request for reconsideration is unsuccessful, the claimant is entitled to a hearing before an administrative law judge (ALJ) within the Social Security Administration (SSA). 42 U.S.C. 405(b); 20 C.F.R. 404.929-404.961.

If the ALJ issues an adverse decision, the claimant may seek review by SSA's Appeals Council. See 20 C.F.R. 404.900(a)(4) ("If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision."); 20 C.F.R. 404.966-404.982 (Appeals Council procedures).[5] The Appeals Council was established in

[4] As part of its disability redesign initiative, the Social Security Administration (SSA) is currently testing possible modifications to the disability determination process. *Inter alia*, SSA is testing in 10 States the effect of eliminating the requirement that a claimant request reconsideration by the state agency before proceeding to the next step of the administrative process. See 20 C.F.R. 404.906; 60 Fed. Reg. 20,023-20,026 (1995); 64 Fed. Reg. 47,218-47,219 (1999).

[5] As part of its disability redesign initiative (see note 4, *supra*), SSA is currently testing in certain cases the elimination of the requirement that a claimant file a request for Appeals Council review before seeking relief in court. See 20 C.F.R. 404.966; 62 Fed. Reg. 49,598-49,602 (1997).

January 1940 by the Social Security Board, see 5 Fed. Reg. 4169, 4171-4174 (1940), based on a 1940 Report of the Social Security Board regarding the manner in which the hearing and review provisions in 42 U.S.C. 405 would be implemented. See Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 3 (Appendix) at 36, 39, 53-55 (1941); *Weinberger* v. *Salfi*, 422 U.S. 749, 759-760 n.6 (1975); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 234 (1990). The Appeals Council is chaired by the Associate Commissioner for Hearings and Appeals. *Id.* at 236; 60 Fed. Reg. 22,142 (1995). In fiscal year 1999, the Appeals Council received 115,151 requests for review and acted on 91,173 such requests. See Social Security Administration, Office of Hearings and Appeals, *Key Workload Indicators–Fiscal Year 1999* (*Key Workload Indicators*) at 21.[6] A request for review is typically considered by a panel of the Appeals Council, but the Appeals Council may consider a case en banc at the direction of the Chairman. See 20 C.F.R. 422.205(b) and (e).

"The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge." 20 C.F.R. 404.967; see also 20 C.F.R.

[6] The Appeals Council remanded 20,135 cases in fiscal year 1999 (22% of the 91,173 dispositions) and ordered an award of benefits in 1824 other cases (2.0%). *Key Workload Indicators* at 21.

404.981.[7] SSA regulations provide that, as a general matter, review by the Appeals Council is appropriate where (1) "[t]here appears to be an abuse of discretion by the [ALJ]"; (2) "[t]here is an error of law"; (3) "[t]he action, findings or conclusions of the [ALJ] are not supported by substantial evidence"; or (4) "[t]here is a broad policy or procedural issue that may affect the general public interest." 20 C.F.R. 404.970(a)(1)-(4). The Appeals Council's review is made on the basis of the record before the ALJ unless the claimant submits "new and material evidence" that "relates to the period on or before the date of the [ALJ] hearing decision." 20 C.F.R. 404.970(b); see also 20 C.F.R. 404.968(a) ("[a]ny documents or other evidence [the claimant] wish[es] to have considered by the Appeals Council should be submitted with [the] request for review"). If the claimant submits new evidence satisfying the regulatory criteria, the Appeals Council will consider the entire record, including the new evidence, and "will then review the case if it finds that the [ALJ's] action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. 404.970(b).

If the Appeals Council grants review, the claimant is given an "opportunity to file briefs or other written statements about the facts and law relevant to the case." 20 C.F.R. 404.975. The Appeals Council may choose to limit the issues that it will consider on review of the ALJ decision. 20 C.F.R. 404.976(a). The claimant may also request an opportunity to present oral argument, and such a request will be granted if the Appeals Council "decides that [the] case raises an important

[7] The Appeals Council is also authorized to review an ALJ decision on its own motion. 20 C.F.R. 404.969.

question of law or policy or that oral argument would help to reach a proper decision." 20 C.F.R. 404.976(c).

2. An unsuccessful applicant for disability benefits may seek judicial review in federal district court of "any final decision of the Commissioner of Social Security made after a hearing to which he was a party." 42 U.S.C. 405(g). The Social Security Act does not specify the point at which the Commissioner's decision becomes "final." SSA's regulations make clear, however, that, with exceptions not relevant here, an individual must file a request for review by the Appeals Council in order to obtain a "final decision" of the Commissioner. See 20 C.F.R. 404.900(a)(5), 404.955, 404.981; *City of New York*, 476 U.S. at 482.[8] If the Appeals Council denies review, the ALJ's decision becomes the agency's "final decision" and is then subject to judicial review. See 20 C.F.R. 422.210(a) ("A claimant may obtain judicial review of a decision by an administrative law judge if the Appeals Council has denied the claimant's request for review").[9] If the Appeals Council grants review and

[8] SSA has established an expedited appeals process under which claimants may obtain access to judicial review without full exhaustion of administrative remedies in cases where the only matter in controversy concerns the constitutionality of a provision of the Social Security Act. See 20 C.F.R. 404.900(a)(6), 404.923-404.928. In addition, SSA is currently testing the elimination of Appeals Council review in certain cases. 20 C.F.R. 404.966; see note 5, *supra*. The instant case does not implicate either of those exceptions to the general rule that a claimant must seek review by the Appeals Council in order to obtain a "final decision" of the Commissioner subject to judicial review under 42 U.S.C. 405(g).

[9] In that respect judicial review of SSA disability determinations is analogous to this Court's review of state court decisions under 28 U.S.C. 1257. Under that statute, the Court is authorized to review "[f]inal judgments or decrees of the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). To

issues its own decision in the case, that is the "final decision of the Commissioner." *Ibid.*[10]

3. On August 3, 1994, petitioner Juatassa Sims filed an application for disability benefits under Title II and Title XVI of the Act. J.A. 29. She alleged disability beginning April 1, 1992, due to a variety of medical problems, including degenerative joint disease of the lumbar spine and possible carpal tunnel syndrome. After the state agency denied petitioner's claim and her subsequent request for reconsideration, petitioner requested a hearing before an ALJ. Petitioner was represented by an attorney at the ALJ hearing. See *ibid.*

The ALJ denied petitioner's claim for benefits. J.A. 29-49. After reviewing the relevant medical evidence, the ALJ performed the five-step sequential-evaluation analysis described at pages 2-3, *supra*. (1) The ALJ noted that petitioner "ha[d] not engaged in substantial gainful activity since the alleged onset date, April 1, 1992." J.A. 30; see J.A. 40 (Finding No. 2). (2) The ALJ found that petitioner "has 'severe' impairments, [including] degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual

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obtain review under Section 1257, a party who has received an unfavorable decision from an intermediate state appellate court must ordinarily seek discretionary relief from the highest court of the State. But if the highest state court denies review, it is the intermediate court's decision (rather than the order of the highest state court denying review) that is then subject to review in this Court. See, *e.g.*, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 159-160 (1954); Sup. Ct. R. 13.1.

[10] Alternatively, the Appeals Council may grant review and remand the case to the ALJ for further proceedings. See 20 C.F.R. 404.967.

functioning, and somatoform disorder." J.A. 36; see J.A. 40 (Finding No. 3). (3) The ALJ determined that "[b]ased on the record, [petitioner's] mental impairments and physical impairments do not meet or equal a listing in Appendix 1." J.A. 37; see J.A. 40 (Finding No. 3). The ALJ further found that petitioner "has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for being unable to lift more than 20 pounds and being unable to perform jobs precluded by mild to moderate difficulties with concentration and attention." J.A. 40 (Finding No. 5); see J.A. 37 (stating that petitioner is unable to "lift[] heavy weights" or do "work that involves a high level of concentration," but that she "is able to perform a reduced range of light work"); J.A. 41 (Finding No. 7) (same). (4) "Based on [petitioner's] chronic back pain and diagnoses of degenerative disc disease and possible carpal tunnel syndrome, [the ALJ] f[ou]nd that she would not be able to return to her past relevant work because the exertional demands of the work exceed her present residual functional capacity." J.A. 39; see J.A. 40 (Finding No. 6). (5) However, relying on the hearing testimony of a vocational expert, the ALJ determined that petitioner is capable of performing a number of "light exertional" jobs that exist in the national economy. J.A. 39; see J.A. 41 (Finding No. 10). The ALJ accordingly held that petitioner does not suffer from a "disability" within the meaning of the Social Security Act. J.A. 39; see J.A. 41 (Finding No. 12); J.A. 31.

Along with the ALJ's decision, petitioner and her attorney were provided with a Notice of Decision form that briefly described the Appeals Council process. J.A. 25-28. The Notice of Decision stated: "If you do not agree with [the ALJ's] decision, you may file an appeal

with the Appeals Council." J.A. 25. It explained that the request for review must be made in writing, either through use of SSA's Form HA-520 or by letter. *Ibid.*[11] The Notice of Decision stated that if petitioner requested Appeals Council review, "the Council will consider all of [the ALJ's] decision, even the parts with which [petitioner] may agree." J.A. 26. It also explained that the Appeals Council could review the ALJ's decision even if petitioner did not request review. J.A. 27. The Notice of Decision then stated: "If you do not appeal and the Council does not review [the ALJ's] decision on its own motion, you will not have a right to court review. [The ALJ's] decision will be a final decision that can be changed only under special rules." *Ibid.*[12]

Petitioner then sought review by the Appeals Council. Petitioner's attorney initiated the administrative appeal by submitting to the Appeals Council a letter describing numerous purported flaws in the ALJ's analysis of the evidence and conduct of the

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[11] Form HA-520 is a standardized SSA form that may be used to request Appeals Council review. The current version of Form HA-520 is available at <http://www.ssa.gov/online/ha-520.pdf. SSA regulations provide that a request for Appeals Council review "may be made on Form HA-520 * * * or by any other writing specifically requesting review." 20 C.F.R. 422.205(a). We have lodged a copy of Form HA-520 with the Clerk of this Court.

[12] The Notice of Decision further explained: "You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with [the ALJ's] decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. [The ALJ's] decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days." J.A. 27-28.

hearing. See J.A. 51-70. The Appeals Council denied the request for review. J.A. 71-73.

3. Petitioner filed suit in federal district court pursuant to 42 U.S.C. 405(g). The case was assigned to a magistrate judge, who prepared a report and recommendation concluding that SSA's ruling should be affirmed and the complaint dismissed with prejudice. J.A. 74-82. The magistrate judge found that the ALJ had properly declined to credit the report of petitioner's psychologist, Dr. Morris, because Dr. Morris's findings were controverted by other evidence. J.A. 77-78. The magistrate judge also rejected petitioner's contentions that the ALJ had selectively ignored evidence bearing on her mental condition (J.A. 78-79); that the ALJ had improperly failed to order a consultative examination under 20 C.F.R. 404.1519 (J.A. 79-80); and that the ALJ had erred by failing to include all of petitioner's impairments in posing a hypothetical question regarding the availability of jobs that petitioner is capable of performing (J.A. 80-81). The district court adopted the report and recommendation of the magistrate judge and entered a final judgment affirming the Commissioner's decision and dismissing the suit. J.A. 83-84.

4. Petitioner appealed, raising three claims of error. First, petitioner contended that the ALJ had given insufficient weight to the medical opinion of Dr. Morris, and had improperly substituted his own views for those of the medical expert with respect to the extent of petitioner's impairments. Pet. C.A. Br. 20-35. Second, petitioner argued that, even accepting the ALJ's own findings as to the severity of petitioner's medical impairments, the ALJ had erred in assessing petitioner's residual functional capacity (RFC)—*i.e.*, in concluding that she was capable of performing "light work." *Id.* at

35-38. Finally, petitioner contended that, in light of the ALJ's findings regarding the severity of petitioner's impairments, the ALJ had violated his duty of full inquiry by failing to order either a psychological or physical consultative examination. *Id.* at 39-43.

The court of appeals affirmed. J.A. 85-86. The court rejected petitioner's contention that the ALJ had failed to accord proper weight to Dr. Morris's opinion. It explained that the claim was "without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly." J.A. 86. Relying on *Paul* v. *Shalala*, 29 F.3d 208 (5th Cir. 1994),[13] the court held that it "lack[ed] jurisdiction to review [petitioner's] second and third contentions because they were not raised before the Appeals Council." J.A. 86.

SUMMARY OF ARGUMENT

1. The requirement that a disability claimant seek Appeals Council review before instituting a judicial

[13] The Fifth Circuit in *Paul* held that it "ha[d] jurisdiction to review the [agency's] final decision [in a disability case] only where a claimant has exhausted her administrative remedies." 29 F.3d at 210. The court held that one of the two claims of error raised by the claimant in that case had not been raised before the Appeals Council, and it accordingly declined to consider that claim. *Ibid.* After comparing Paul's brief on appeal with her submission to the Appeals Council, the court held that the claim in question was a "distinct" new argument rather than simply "an expansion of the general rationale proffered in support of the [administrative] appeal." *Ibid.* The Fifth Circuit acknowledged that under some circumstances, "equitable grounds may support this court's decision to consider issues not previously presented." *Ibid.* It found, however, that no such grounds existed in that case, explaining that "Paul's failure to raise her claim during the administrative process was her own doing" and was not caused by any misrepresentation made by the SSA. *Id.* at 211.

action serves the interests of both the Social Security Administration (SSA) and the courts. That exhaustion requirement affords SSA the opportunity to correct its own mistakes, thereby obviating the need for judicial intervention, or to clarify the agency's interpretation of governing statutory and regulatory provisions in a manner that facilitates judicial review. Those policies can be effectively vindicated, however, only if the party that pursues an administrative appeal alerts the agency to the purported flaws in its preliminary resolution of the dispute. The requirement that individual claims of error must be raised before the Appeals Council in order to be cognizable in court is therefore an important corollary to the basic exhaustion requirement. Such a rule significantly facilitates the Appeals Council's performance of its assigned functions, while imposing no meaningful incremental burden on the claimant.

This Court has developed an analogous procedural default rule in the context of federal habeas corpus. A prisoner in state custody has "exhausted" his state remedies if he has pursued all available avenues of state court review (or if the time for doing so has expired), even if he has failed to raise a particular claim at the appropriate time. The Court has recognized, however, that enforcement of procedural default rules, with respect to claims not raised, is essential in order to vindicate the underlying purposes of the statutory exhaustion requirement. The same reasoning applies here.

2. In the instant case, the claims that the court of appeals held to be barred were not raised in *any* administrative forum. Because petitioner's second and third claims of error were premised on the findings made by the ALJ, and were therefore logically unavailable until the ALJ issued his decision, petitioner's

failure to present those arguments to the ALJ does not constitute an independent barrier to their consideration by the courts. But precisely because no SSA official had previously been given an opportunity to consider those claims of error, it was particularly important that the claims be presented to the Appeals Council. On the facts of this case, application of a procedural default rule thus serves to vindicate the basic administrative law principle that an agency's decision is not subject to judicial invalidation on grounds not first presented to the agency.

3. Enforcement of an administrative default rule is fully consistent with the informal and non-adversarial character of SSA's administrative processes for resolving disability claims. Because the Appeals Council functions as an appellate tribunal, it is reasonable to expect that the party who invokes its jurisdiction will perform an appellant's usual role, by identifying the alleged deficiencies in the ALJ's disposition of the case and explaining why the matter warrants further review. Notwithstanding the informal and non-adversarial character of the proceedings, the claimant and her attorney are given both the right and the incentive to perform that role. There is also no basis for petitioner's contention that an administrative default rule would complicate the proceedings by requiring long or hyper-technical filings in support of requests for Appeals Council review. Even a very short and relatively inartful statement of the grounds for review is sufficient, so long as the claimant's filing identifies the purported flaws in the ALJ's disposition of the case, thereby enabling the Appeals Council to focus its attention on those aspects of the ALJ decision with which the claimant disagrees.

4. Petitioner had fair warning that arguments not raised before the Appeals Council would be barred on judicial review. Petitioner was represented by counsel during the Appeals Council proceedings. Her attorney can fairly be charged with knowledge of the fundamental background rule that objections not presented to an administrative agency will be foreclosed in a subsequent judicial proceeding. SSA's regulations and administrative practice do not suggest any exception to that presumptive rule. Petitioner's claim of unfair surprise is particularly unpersuasive in light of the Fifth Circuit's prior decision in *Paul* v. *Shalala*, 29 F.3d 208, 210-211 (1994), which gave petitioner and her attorney unambiguous notice that claims not raised before the Appeals Council would ordinarily be barred from subsequent judicial consideration.

ARGUMENT

THE COURT OF APPEALS PROPERLY DECLINED TO ADDRESS PETITIONER'S SECOND AND THIRD CLAIMS OF ERROR BASED ON PETITIONER'S FAILURE TO PRESENT THOSE CLAIMS TO THE SOCIAL SECURITY ADMINISTRATION'S APPEALS COUNCIL

Judicial review in Social Security cases is governed by 42 U.S.C. 405(g). Section 405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, may obtain a review of such decision by a civil action" filed in federal district court. Although the Social Security Act requires a "final decision of the Commissioner" as a prerequisite to judicial review, the Act does not specify the point at which the Commissioner's decision becomes "final." As this Court

observed in *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), "[t]he term 'final decision' is not only left undefined by the Act, but its meaning is left to the [Commissioner] to flesh out by regulation."[14]

SSA's regulations make clear that, with exceptions not relevant here (see note 8, *supra*), an applicant for disability benefits must seek review by the Appeals Council in order to obtain a "final decision" of the Commissioner. Thus, 20 C.F.R. 404.900(a)(1)-(4) describes the four levels of administrative review available in such cases: an initial determination by the relevant state agency, a request for reconsideration of that decision, a hearing before the ALJ, and a request for review by the Appeals Council. Section 404.900(a)(5) then states:

> When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

20 C.F.R. 404.900(a)(5); see also 20 C.F.R. 404.955, 404.981, 422.210(a); *Bowen* v. *Yuckert*, 482 U.S. 137, 142 (1987); *Bowen* v. *City of New York*, 476 U.S. 467, 472,

[14] The Commissioner "is authorized to delegate to any member, officer, or employee of the Social Security Administration designated by the Commissioner any of the powers conferred upon the Commissioner." 42 U.S.C. 405(*l*). As the Court in *Salfi* explained, "Section 405(*l*) accords the [Commissioner] complete authority to delegate his statutory duties to officers and employees of the [SSA]. The statutory scheme is thus one in which the [Commissioner] may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." 422 U.S. at 766.

482 (1986); *Heckler* v. *Ringer*, 466 U.S. 602, 606, 627 (1984). Where (as here) the Appeals Council denies the claimant's request for review, the ALJ's decision becomes the "final decision of the Commissioner" and is subject to judicial review under 42 U.S.C. 405(g). See 20 C.F.R. 422.210(a); pp. 7-8, *supra*.

By seeking Appeals Council review of the ALJ's adverse decision, petitioner satisfied the statutory exhaustion requirement—*i.e.*, she obtained a "final decision of the Commissioner" subject to judicial review under 42 U.S.C. 405(g). Under established principles of administrative law, however, petitioner's second and third claims of error in the Fifth Circuit were barred by her failure to raise those claims during the administrative process. That rule of "administrative default"[15] is fully applicable to Social Security disability appeals.

[15] We use the term "administrative default," in preference to petitioner's term "issue exhaustion," in order to make clear our recognition that petitioner obtained a "final decision of the Commissioner" and therefore did not fail to comply with that statutory exhaustion requirement. Compare *O'Sullivan* v. *Boerckel*, 119 S. Ct. 1728, 1734 (1999) and *id.* at 1736-1737 (Stevens, J., dissenting), discussed at pp. 26-27, *infra*. In *Johnson* v. *Apfel*, 189 F.3d 561 (7th Cir. 1999), the court of appeals misunderstood that terminology. In *Johnson*, as in the instant case, a disability claimant unsuccessfully requested Appeals Council review. The claimant then sought to raise in court a claim that had not been asserted in the administrative appeal. *Id.* at 562. In rejecting the government's contention that the claim was barred, the court of appeals noted that "[t]he government's lawyers * * * are explicit that [Johnson] did *not* fail to exhaust his administrative remedies." *Id.* at 563. The court "t[ook] this to mean * * * that requiring the claimant to brief his issues before the Appeals Council is not important to the agency's mission." *Ibid.* As we explain below, that conclusion does not follow. Although petitioner's default did not, precisely speaking, constitute a failure to exhaust her

A. Where Exhaustion Of An Administrative Appeal Is A Prerequisite To A Judicial Action, The Failure To Raise A Claim In The Administrative Appeal Will Ordinarily Constitute A Procedural Default That Bars Consideration Of The Claim On Judicial Review

1. The purposes that underlie exhaustion requirements strongly suggest that, where pursuit of an administrative appeal is a prerequisite to judicial review, the court should ordinarily entertain only those claims that have been presented to the agency tribunal.[16] As the Court recognized in *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969), consistent enforcement of exhaustion requirements is supported both by respect for agency prerogatives and by concern for judicial efficiency. The Court explained:

> A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

Id. at 195. Accord, *e.g.*, *Salfi*, 422 U.S. at 765 ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."); *Heckler* v. *Ringer*, 466 U.S. 602, 619-620 n.12 (1984); *McCarthy* v. *Madigan*, 503 U.S. 140, 144-146 (1992). The Social Security Board identified a number of those advantages when it established the Appeals Council in 1940 and required that a claimant request review by the Appeals Council in order to obtain the agency's final decision. See Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 3 (Appendix) at 39, 51, 53-56 (1941).

Those purposes can be effectively vindicated, however, only if the party who pursues an administrative appeal alerts the agency to the purported flaws in its

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administrative remedies, it nevertheless impaired the Appeals Council's ability to perform its assigned appellate function.

[16] Some statutory review provisions specifically preclude the assertion in court of any objections or issues that have not been raised in the administrative proceedings. See, *e.g.*, 29 U.S.C. 160(e) ("No objection that has not been urged before the [National Labor Relations] Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). This Court has treated such express statutory preclusion provisions as going to the "jurisdiction" of the reviewing court. See *Woelke & Romero Framing, Inc.* v. *National Labor Relations Board*, 456 U.S. 645, 666 (1982) ("the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board"). The "common law" administrative default principle applies as an essential corollary to a statutory exhaustion requirement where (as here) the governing law contains no express statutory bar to judicial consideration of issues not raised before the agency. In the latter context, however, the reviewing court has greater latitude to excuse a claimant's default in appropriate cases. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the * * * administrative agency below."); note 13, *supra*.

preliminary resolution of the dispute. In the instant case, petitioner argued at length in her administrative appeal to the Appeals Council that the ALJ had improperly rejected the examining physician's assessment of petitioner's medical impairments. See J.A. 51-70. Petitioner did not, however, raise the challenges subsequently advanced in the court of appeals as her second and third claims of error.[17] With respect to

[17] The government's brief in the court of appeals argued that the court should not consider petitioner's second and third claims of error because those claims had not been raised administratively. Gov't C.A. Br. 13-15. With respect to the purported need for a consultative examination (the third claim of error), petitioner did not dispute the government's assertion that the claim had not been presented to the Appeals Council. See Pet. C.A. Reply Br. 5. With respect to the second claim of error, however, petitioner argued that she had

> adequately raised the issue of the Commissioner's assessment of her RFC to the Appeals Council and to the district court. In fact, the *entire basis* of her appeal is that the ALJ failed to adequately evaluate the opinions of her medical providers in formulating her residual functional capacity to work. Even if [petitioner's] counsel did not word the Appeals Council argument as to her RFC in exactly the same manner as in the [court of appeals brief], the substance of the argument is the same.

Id. at 2. In her brief in this Court, petitioner suggests that her second claim of error was raised at least obliquely in the administrative process, and that the Fifth Circuit's dismissal of that claim necessarily reflects a highly technical pleading requirement. See Pet. Br. 4 n.3, 19, 45 n.33.

The question whether petitioner actually raised her second claim of error in the Appeals Council is not fairly included within the question presented in the petition for certiorari. In any event, the court of appeals correctly held that the claim had not been raised in the administrative appeal. The gravamen of the letter submitted to the Appeals Council by petitioner's attorney was that

those claims, petitioner's administrative appeal gave SSA no meaningful "opportunity to correct its own errors" (*Salfi*, 422 U.S. at 765), or to state the agency's views regarding the pertinent aspects of the ALJ's decision. The requirement that individual claims of error must be brought before the Appeals Council in order to be cognizable in court is therefore an important corollary to the requirement that administrative remedies must be exhausted as a prerequisite to judicial review.[18]

the ALJ's findings regarding the severity of petitioner's mental and physical impairments was contrary to the available medical evidence. See J.A. 51-70. Petitioner pursued that argument (as her first claim of error) in the court of appeals, and the court rejected the claim on the merits. See J.A. 86. In the court of appeals, however, petitioner also contended (as her second claim of error) that, *even accepting the ALJ's factual findings as to the scope of her impairments*, there was still no basis for the ALJ's determination that petitioner was capable of performing gainful work. See Pet. C.A. Br. 35-38.

That claim of error is quite different from the arguments made in the Appeals Council. There is consequently no basis for concluding that the Fifth Circuit applied a highly technical standard in determining that her second claim of error had not been raised before the Appeals Council.

[18] Petitioner and her amici contend (Pet. Br. 42 n.31; AARP Br. 8-14) that presentation of particular claims to the Appeals Council will sometimes be futile, since the Appeals Council is required to decide individual cases in conformity with SSA policy. This case does not present the question whether, and under what circumstances, a "futility" exception to the basic administrative default rule might permit a claimant to advance in court an argument that was not presented in her request for Appeals Council review, on the ground that the Appeals Council would have been bound by the Act or governing regulations to reject the argument. See *Mathews* v. *Eldridge*, 424 U.S. 319, 329-330 (1976). Whatever the contours of such an exception, it would not apply here, since the

Indeed, the "administrative default" principle is significantly *less* burdensome than the antecedent requirement that a disability claimant must seek Appeals Council review in order to obtain a "final decision" of the Commissioner. That basic exhaustion requirement benefits both the agency and the court, but it imposes meaningful costs for claimants as well, since it delays the ultimate resolution of those cases in which the Appeals Council denies review.[19] The prospect of such delay has sometimes led this Court to conclude that exhaustion of specific administrative remedies is not an appropriate prerequisite to judicial review. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. at 146 ("In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."); *id.* at 146-147 (citing cases); *Eldridge*, 424 U.S. at 330 ("cases may arise where a claimant's interest in having

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claims that the court of appeals held to be barred indisputably fall well within the Appeals Council's bailiwick. Moreover, there is no reason to suppose that a large percentage of objections that might provide the basis for judicial relief will be beyond the cognizance of the Appeals Council. As SSA has explained, "the vast majority of adverse circuit court decisions do not conflict with [SSA's] interpretation of the Act or regulations; they are based either on the issue of whether substantial evidence supports SSA's final administrative decision or on the issue of whether the final administrative decision adheres to established agency rules." 63 Fed. Reg. 24,930 (1998).

[19] Of course, the availability of an administrative appeal also benefits claimants by affording them an opportunity for relief in a non-adversary setting following an adverse ALJ decision, without the need to file suit in court. The Appeals Council granted some form of relief in 21,959 cases in 1998, a total of over 22% of the 91,173 Appeals Council dispositions. See p. 5 & note 6, *supra*.

a particular issue resolved promptly is so great that deference to the agency's judgment [regarding the need for exhaustion] is inappropriate").

But where (as here) it is undisputed that a party must invoke a particular administrative tribunal before seeking relief in court, the requirement that all objections to the agency's preliminary disposition must be presented to that tribunal imposes no meaningful incremental burden on the claimant. To the contrary, under the Social Security disability programs, such a requirement can be expected to serve the interests of claimants by enhancing the Appeals Council's ability to identify those cases in which relief should be awarded without the need for judicial proceedings.[20] By contrast, a regime in which disability claimants were required to request review by the Appeals Council before pursuing judicial remedies, but were not required to

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[20] By enhancing the Appeals Council's ability to identify meritorious claims, thereby obviating the need for judicial review, administrative default principles serve the interests of the courts as well. The burden on judicial resources imposed by disability litigation under the Social Security Act is very substantial. In fiscal year 1998, 7770 disability insurance cases under Title II of the Act, and 5887 Supplemental Security Income cases under Title XVI, were filed in the federal district courts. See Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 144 (1998). And insofar as the application of administrative default principles reduces the burden on reviewing courts, it directly furthers the purposes of the underlying exhaustion requirement. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. at 145 ("exhaustion promotes judicial efficiency" because (*inter alia*) "[w]hen an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted"); *McKart*, 395 U.S. at 195 ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene.").

identify the purported flaws in the ALJ's decisions, would give claimants, SSA, and the courts the worst of both worlds. Compliance with the exhaustion requirement would delay the claimant's access to court, and thus defer the ultimate resolution of the dispute, without providing the agency a fully adequate opportunity either to correct its own mistakes and thereby obviate the need for judicial intervention altogether, or at least to clarify the issues for judicial review and give the reviewing court the benefit of its experience or expertise.

For essentially the same reasons, the fact that SSA has considered eliminating the requirement that claimants seek review in the Appeals Council before proceeding to court (see Pet. Br. 23-24, 35) is irrelevant to the question presented in this case. Reasonable people may disagree as to whether the systemic benefits of Appeals Council review are sufficient to justify the delay and expense that the exhaustion requirement entails. But doubts concerning the wisdom of the underlying exhaustion requirement can provide no justification for the regime that petitioner advocates, in which claimants and the agency must accept the disadvantages that attend the Appeals Council process without the advantages that administrative default rules provide.

Petitioner and her amici also suggest (Pet. Br. 36-37, 40-41; AARP Br. 5-8) that her position is supported by the facts that (a) the resources of the Appeals Council are strained by the enormous volume of cases brought before it, and (b) in a majority of cases the Appeals Council denies review without explanation. Those arguments are without merit. As to the former point: the fact that the Appeals Council's resources are limited simply reinforces the importance of using those

resources wisely by requiring claimants to identify the particular respects in which ALJs are alleged to have erred. As to the latter: the Appeals Council granted some form of relief in almost 22,000 cases in fiscal year 1999, which represented more than 24% of the cases in which it entered dispositions.[21] In any event, whatever relevance those statistics might have to the question whether exhaustion of Appeals Council remedies should be required at all, they provide no justification for the regime that petitioner advocates, under which a claimant would be required to seek Appeals Council review, but would not be required to specify the alleged flaws in the ALJ's decision, in order to file suit in court. See pp. 22-24, *supra*.

2. This Court has developed an analogous procedural default rule in the context of federal habeas corpus. The federal habeas statute provides that a prisoner in state custody may not obtain relief unless he "has exhausted the remedies available in the courts of the State." 28 U.S.C. 2254(b)(1)(A) (Supp. IV 1998). In applying Section 2254(b)(1)(A) (and its predecessors), this Court has recognized that while the question of procedural default is technically distinct from that of exhaustion, the application of procedural bar rules is an essential means of vindicating the purposes that the exhaustion requirement is intended to serve.

A prisoner in state custody has "exhausted" his state remedies if he has invoked every available avenue of

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[21] The Appeals Council received 115,151 requests for review in fiscal year 1999 and acted upon 91,173 requests. See Social Security Administration, Office of Hearings and Appeals, *Key Workload Indicators–Fiscal Year 1999* at 21. It remanded 20,135 of those cases (22% of the 91,173 dispositions) and ordered an award of benefits in 1824 other cases (2.0%). *Ibid.* See also Pet. Br. 37 n.26 (citing comparable statistics for fiscal year 1998).

state court review (or if the time for doing so has expired), even if the prisoner failed to raise a particular claim at the appropriate time. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 119 S. Ct. 1728, 1734 (1999); *id.* at 1736-1737 (Stevens, J., dissenting); *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991); *Engle* v. *Isaac*, 456 U.S. 107, 125-126 n.28 (1982). This Court has recognized, however, that if federal habeas courts were willing to entertain claims that had not been presented to the state courts,

> a prisoner could evade the exhaustion requirement —and thereby undercut the values that it serves— by "letting the time run" on state remedies. To avoid this result, and thus "protect the integrity" of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts.

O'Sullivan, 119 S. Ct. at 1734 (citations omitted)[22]; see also *Coleman*, 501 U.S. at 731-732 (explaining the connection between exhaustion and procedural default

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[22] In *O'Sullivan*, the state prisoner filed a petition for leave to appeal to the Illinois Supreme Court, raising three challenges to his state conviction. 119 S. Ct. at 1730. The Illinois Supreme Court denied the petition for leave to appeal. *Ibid.* The prisoner then sought federal habeas review. Included in his habeas petition were three claims that might have been, but were not, presented in his request for discretionary review in the state supreme court. *Id.* at 1730-1731. This Court first held that a state prisoner must generally file a petition for discretionary review in the state supreme court in order to satisfy Section 2254(b)(1)(A)'s exhaustion requirement. See 119 S. Ct. at 1731-1734. The Court then held that claims not presented in that petition for discretionary review would be barred from consideration on federal habeas on the ground of procedural default. See *id.* at 1734.

rules). The same reasoning applies here. Although petitioner's request for Appeals Council review technically satisfied the statutory requirement that she obtain a "final decision of the Commissioner" (42 U.S.C. 405(g)) before filing suit, the *purposes* of that requirement would be substantially undermined if petitioner were permitted to raise in court objections to the ALJ's decision that were not presented in her administrative appeal.[23]

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[23] In *Darby* v. *Cisneros*, 509 U.S. 137 (1993), this Court considered the effect of Section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. 704. The Court held that Section 10(c), by defining the circumstances under which agency action becomes "final" for purposes of judicial review, precludes the courts from imposing additional exhaustion requirements in APA suits. 509 U.S. at 144-147, 153-154. That holding has no direct relevance to this case. Petitioner's suit was brought under 42 U.S.C. 405(g), not under the APA; SSA regulations state unambiguously that a request for Appeals Council review is an essential prerequisite to filing suit in court; and the validity of that exhaustion requirement is established by prior decisions of this Court and is not in dispute here.

Petitioner, however, appears to read *Darby* to stand for a much broader proposition—*i.e.*, that courts lack power under either the APA or the Social Security Act to apply *any* judicially fashioned limitations on the availability or scope of judicial review beyond those expressly stated in the governing statute or applicable regulations. See Pet. Br. 25-27. Petitioner's reliance on *Darby* is misplaced. The Court's analysis in *Darby* rested on the fact that Section 10(c) of the APA directly and comprehensively addresses the specific question of when an appeal to a higher administrative authority is a prerequisite to judicial review. The Court recognized, however, that "federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review." 509 U.S. at 146. The Court's recognition of that authority in APA cases is consistent with the original understanding of the Act. See *Attorney General's Manual on the Administrative Procedure Act* 93 (1947)

B. The Second And Third Claims Of Error That Petitioner Asserted In The Court of Appeals Were Not Raised In Her Request For Review By The Appeals Council And Are Therefore Barred Under Established Principles Of Administrative Law

For the reasons stated above, the purposes of an exhaustion requirement will generally be served only if the appellant is required to present, in his administrative appeal, all claims that he intends to raise in court. A disability claimant's failure to present a claim of error to the Appeals Council therefore should ordinarily bar its consideration in subsequent judicial proceedings.

That rule should apply even in cases where the relevant legal or factual theory was advanced in the proceedings before the ALJ, for in those circumstances the failure to renew the same objection before the Appeals Council would manifest not merely procedural default, but a deliberate abandonment. Here, however, the second and third claims of error that petitioner advanced in the court of appeals were never presented to *any* administrative authority. Because those claims

(observing that Section 10 of the APA "deals largely with principles" and "generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules' ,. In noting that "the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA," 509 U.S. at 153-154, the *Darby* Court further acknowledged the continuing authority of courts to apply "common law" principles to judicial review of federal agency action, so long as the applicable statutory review provision does not specifically address the relevant question. Because Section 405(g) does not specifically address the authority of a reviewing court to consider objections to an ALJ decision that were not raised before the agency, that question is governed by background principles of administrative law.

were premised on the findings made by the ALJ, and were therefore logically unavailable until the ALJ issued his decision, petitioner's failure to present the arguments to the ALJ does not constitute an independent barrier to their consideration by the courts.[24] But precisely because no SSA adjudicatory official had previously been given an opportunity to consider those claims of error, it was particularly important to the agency's decisionmaking process that the claims be presented to the Appeals Council.

This Court has long recognized, as a fundamental background rule of administrative law, that plaintiffs may not ordinarily obtain judicial review of legal challenges to agency action unless those challenges are first presented to the agency itself. As the Court explained in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952),

> orderly procedure and good administration require that objections to the proceedings of an admini-

[24] Petitioner's second claim of error in the court of appeals was that, even accepting the ALJ's findings as to the severity of her medical impairments, the ALJ had erred in assessing petitioner's RFC. See Pet. C.A. Br. 35-38; note 17, *supra*. By its nature, that claim could not have been raised during the proceedings before the ALJ. Petitioner's third claim of error—*i.e.*, her contention that under the circumstances of this case, the ALJ was required (even in the absence of a request by petitioner) to order a consultative examination before denying benefits—was similarly premised on the ALJ's finding that petitioner suffered from "severe" impairments. See *id.* at 39-43. Thus, petitioner contended in the court of appeals that "the ALJ's own findings that the medical evidence established the presence of specific medical conditions raises the requisite level of suspicion such that the Commissioner is required to order consultative examinations to determine ***the extent of such conditions***." *Id.* at 40-41. That claim likewise could not have been raised during the ALJ proceedings.

> strative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Id. at 37; see also *id.* at 36 & n.5 (citing earlier cases).[25] Accord, *e.g.*, *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").[26]

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[25] Correspondingly, a reviewing court may not *affirm* an agency's decision on a ground that the *agency* did not invoke in the administrative proceedings. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

[26] In a variety of circumstances, the courts of appeals have recognized the general rule that a plaintiff may not object in court to administrative action on grounds not first presented to the agency. See, *e.g.*, *Omnipoint Corp.* v. *FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996); *Salt Lake Community Action Program, Inc.* v. *Shalala*, 11 F.3d 1084, 1087 (D.C. Cir. 1993); *Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 5-6 (1st Cir. 1983); *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994, 1000 (2d Cir. 1986); *Director, OWCP* v. *North American Coal Corp.*, 626 F.2d 1137, 1143 (3d Cir. 1980); *Rana* v. *United States*, 812 F.2d 887, 890 (4th Cir. 1987); *Brotherhood of Railway, Airline, and Steamship Clerks* v. *St. Louis Southwestern Railway*, 676 F.2d 132, 136-139 (5th Cir. 1982); *Hix* v. *Director, OWCP*, 824 F.2d 526, 527 (6th Cir. 1987); *Myron* v. *Chicoine*, 678 F.2d 727, 731-732 (7th Cir. 1982); *Edwards* v. *Department of the Army*, 708 F.2d 1344, 1346-1347 (8th Cir. 1983); *Sears, Roebuck & Co.* v. *FTC*, 676 F.2d 385, 398 (9th Cir. 1982); *Rives* v. *I.C.C.*, 934 F.2d 1171, 1176 (10th Cir. 1991), cert. denied, 503 U.S. 959 (1992); *State of Alabama ex rel. Siegelman* v. *U.S.E.P.A.*, 911 F.2d 499, 505-506 (11th Cir. 1990).

As *Tucker Truck Lines* makes clear, the rule that objections not presented to an administrative agency will thereafter be deemed waived applies even where the plaintiff has invoked every available layer of administrative review. The plaintiff in *Tucker Truck Lines* was aggrieved by the decision of an Interstate Commerce Commission hearing examiner. 344 U.S. at 34. The plaintiff filed exceptions to the examiner's decision; subsequently requested reconsideration by the full Commission; and later petitioned the Commission for "extraordinary relief." *Ibid.* Nothing in the Court's opinion suggests that any additional level of administrative review remained available. Rather, the defect in the plaintiff's lawsuit was that the particular objection asserted in court—*i.e.*, the contention that the hearing examiner had been appointed in an invalid manner—had not been raised during the administrative process.

Under petitioner's approach, however, unsuccessful applicants for disability benefits under the Social Security Act could routinely obtain judicial review of legal and factual issues that *no* SSA official had been given the opportunity to consider. To permit judicial review of those claims would subvert the Appeals Council's performance of its assigned function and would contravene established principles of administrative law.

C. Administrative Default Principles Are Fully Applicable To The Appeals Council Process

Petitioner appears to accept the general proposition that claims not pursued in a mandatory administrative appeal cannot thereafter be asserted in court. She contends, however, that application of administrative default principles in the present context would be inappropriate because SSA's administrative processes for resolving disability claims are informal and non-adversarial. That argument is incorrect.

1. This Court has recognized that the requirement of Appeals Council review in Social Security cases serves essentially the same purposes as exhaustion requirements generally. Thus, the Court in *Salfi* cited *McKart* and described the justifications for Section 405(g)'s exhaustion requirement in terms that tracked *McKart*'s general discussion of exhaustion principles. See 422 U.S. at 765; see also *Ringer*, 466 U.S. at 619-620 n.12; page 19, *supra*. In *City of New York*, the Court excused the failure of many members of the class of disability claimants to exhaust their administrative remedies on the ground that

> [t]his case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. *In the normal course, such individual errors are fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation.* Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review

> application of those regulations to a particular factual context.

476 U.S. at 484-485 (emphasis added).[27] As the italicized language makes clear, the guiding assumption in the context of Social Security disability claims, as in other administrative settings, is that the claimant in exhausting his administrative remedies will identify the purported flaws in the agency decision that is the subject of higher-level administrative review.

In *Richardson* v. *Perales*, 402 U.S. 389 (1971), this Court recognized that the informal nature of SSA disability proceedings does not relieve a represented claimant of responsibility for protecting his interests during the administrative process. The Court in *Perales* noted that "strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." *Id.* at 400. The Court accordingly held that the written report of an examining physician could provide a sufficient evidentiary basis to support a hearing examiner's denial of benefits. *Id.* at 402. The Court observed, *inter alia*, that

> [a]lthough the claimant complains of the lack of opportunity to cross-examine the reporting physicians, he did not take advantage of the opportunity afforded him under [the regulations] to request

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[27] In *City of New York*, the Court found that the plaintiffs' failure to exhaust administrative remedies should be excused based on the district court's finding of "a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations." 476 U.S. at 485. The Court concluded that "[u]nder these unique circumstances, there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Ibid.*

> subpoenas for the physicians. * * * This inaction on the claimant's part supports the Court of Appeals' view that the claimant as a consequence is to be precluded from now complaining that he was denied the rights of confrontation and cross-examination.

Id. at 404-405 (citation omitted). *Perales* makes clear that, at least where a disability claimant is represented by counsel (see *id.* at 395-396), he may be foreclosed from raising particular objections to the conduct of the administrative process if he fails to assert his rights in a timely fashion.

2. The Appeals Council is an *appellate* body exercising discretionary jurisdiction.[28] SSA regulations make clear that the Appeals Council will not ordinarily grant review simply to reconsider the ALJ's assessment of the relevant evidence. Rather, Appeals Council review is appropriate where (1) "[t]here appears to be an abuse of discretion by the [ALJ]"; (2) "[t]here is an error of law"; (3) "[t]he action, findings or conclusions of the [ALJ] are not supported by substantial evidence"; or (4) "[t]here is a broad policy or procedural issue that

[28] In that sense the relationship between the Appeals Council and the ALJ is fundamentally different from the relationship between the ALJ and the state agency that makes the initial determination of disability. An individual claimant must apply for benefits with the state agency, and seek reconsideration if the initial application is denied, as a prerequisite to a hearing before the ALJ. But once that prerequisite has been satisfied, the ALJ proceeding involves a de novo determination of the claimant's eligibility for benefits, not an appellate review of the state agency's determination. See *Heckler* v. *Day*, 467 U.S. 104, 107 (1984).

> may affect the general public interest." 20 C.F.R. 404.970(a)(1)-(4).[29]

The Seventh Circuit, in its recent decision holding that a claimant's failure to raise a particular issue before the Appeals Council did not bar him from asserting the claim on judicial review, stated: "Basically all that seems contemplated or required [by SSA regulations] is that the disappointed claimant ask the Appeals Council to take a look at what the administrative law judge has done and reverse if it finds an error. The Appeals Council operates more like a complaint bureau than an appellate court." *Johnson* v. *Apfel*, 189 F.3d 561, 563 (7th Cir. 1999). As the preceding discussion makes clear, that statement reflects a fundamental misconception of the regulatory framework and of the Appeals Council's place in the administrative scheme. The pertinent SSA regulations make clear that the Appeals Council functions as an appellate tribunal, whose ordinary practice is to exercise jurisdiction only in defined categories of cases. It is consequently reasonable to expect that a claimant who invokes the Appeals Council's jurisdiction will perform an appellant's usual role—*i.e.*, to identify the alleged deficiencies in the ALJ's disposition of the case, and to explain why the

[29] Pursuant to 20 C.F.R. 404.970(b), a claimant who is denied benefits by the ALJ may submit "new and material" evidence to the Appeals Council, so long as that evidence "relates to the period on or before the date of the [ALJ] hearing decision." Under that provision, it is possible for the Appeals Council to overturn an ALJ's ruling based on evidence that was not before the ALJ. Even under Section 404.970(b), however, the Appeals Council does not ordinarily undertake a de novo assessment of eligibility for benefits. Rather, it reviews the case "if it finds that the [ALJ's] action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. 404.970(b).

case satisfies the Appeals Council's standards for exercising discretionary review.[30]

Indeed, the majority of the courts of appeals to consider the question have held that administrative default principles apply in this setting and typically bar a claimant from asserting in court objections not presented to the agency. See *Meanel* v. *Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) ("at least when claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal"); *James* v. *Chater*, 96 F.3d 1341, 1343-1344 (10th Cir. 1996) ("[a] request for administrative review, which does not identify the issues with any particularity, effectively sandbags the Appeals Council"); *Harper* v. *Secretary of Health & Human Services*, 978 F.2d 260, 265 (6th Cir. 1992) ("Because the record does not indicate that the issue was raised at the administrative level, we are not in a position to consider the issue"); *Paul* v. *Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) ("Paul's failure to raise her

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[30] The courts of appeals have consistently held that the Appeals Council may review a case on its own motion pursuant to 20 C.F.R. 404.969, whether or not the case falls within one of the categories described in 20 C.F.R. 404.970. See, *e.g.*, *Welch* v. *Heckler*, 808 F.2d 264, 267-268 (3d Cir. 1986); *Bauzo* v. *Bowen*, 803 F.2d 917, 920-922 (7th Cir. 1986); *Mullen* v. *Bowen*, 800 F.2d 535, 542-545 (6th Cir. 1986) (en banc); *Fierro* v. *Bowen*, 798 F.2d 1351, 1353-1354 (10th Cir. 1986), cert. denied, 480 U.S. 945 (1987); *Parker* v. *Bowen*, 788 F.2d 1512, 1518-1519 (11th Cir. 1986) (en banc). Section 404.970 is therefore properly regarded not as a binding constraint on the Appeals Council's discretion to grant review in particular cases, but as a statement regarding the manner in which that discretion will generally be exercised. Cf. Sup. Ct. R. 10. It is nevertheless entirely reasonable to expect that a claimant who invokes the Appeals Council's jurisdiction will at least briefly explain why the case is appropriate for Appeals Council review.

* * * claim in the Appeals Council * * * deprives us of jurisdiction to review the claim"). Prior to its decision in *Johnson*, the Seventh Circuit had applied that rule as well. See *Johnson*, 189 F.3d at 562-563 (citing cases). The Eighth Circuit is the only other court of appeals to have held that a disability claimant may challenge the Commissioner's adverse decision on grounds not raised before the Appeals Council. See *Harwood* v. *Apfel*, 186 F.3d 1039, 1042-1043 (8th Cir. 1999).

3. The informal and non-adversarial character of the Appeals Council proceedings (see 20 C.F.R. 404.900(b)) does not alter the foregoing analysis. Appeals Council proceedings are informal in the sense that technical rules of pleading, document preparation, and evidence do not apply. See 20 C.F.R. 422.205(a) (request for Appeals Council review may be made on a form provided by SSA "or by any other writing specifically requesting review"); cf. *Perales*, 402 U.S. at 400-401. They are non-adversarial in the sense that the disability claimant is not opposed by any advocate charged with defending the ALJ ruling. In those respects the Appeals Council proceedings differ from any subsequent litigation in the federal courts concerning SSA's benefits determinations, which will be governed by the Federal Rules of Civil (or Appellate) Procedure, and in which government counsel will appear to defend the Commissioner's "final decision."

The informal and non-adversarial character of the Appeals Council process, however, does not meaningfully affect the relationship between the claimant and the Appeals Council. As with an appellant in civil litigation or in an "adversarial" administrative appeal, the claimant's objective is to attempt to persuade the appellate body that the trial-level decisionmaker has

erred and that the error warrants appellate correction. In pursuing that objective, the claimant is free to submit "[a]ny documents or other evidence [she] wish[es] to have considered * * * with [her] request for review." 20 C.F.R. 404.968(a). The essential first step in that process is for the claimant to identify, with at least some degree of specificity, the particular respects in which she believes that the ALJ has erred. The fact that no particular form of documentation is required, and that no agency counsel is assigned to oppose the claimant's submission or to defend the ALJ's ruling, cannot reasonably be supposed to render that step superfluous.

Nor does the informal and non-adversarial character of the proceedings alter the role of the claimant's attorney. The claimant's lawyer does not owe primary loyalty to the government, and his role before the Appeals Council is not to assist SSA in arriving at the most accurate possible benefits determination. It is instead to serve as an advocate for the claimant's interests, and to represent those interests as vigorously as possible consistent with applicable norms of ethical practice. The absence of any *opposing* counsel at that stage of the administrative process does not lessen that duty of vigorous advocacy. Just as with any other appellate agency tribunal, the requirement that a disability claimant seek Appeals Council review before filing suit in court therefore carries with it the requirement that a claimant must alert the agency to the purported flaws in the ALJ's decision during the course of the administrative process in order to preserve those claims for judicial review.

The fact that the Appeals Council may choose *sua sponte* to address issues not raised by the claimant does not alter the foregoing analysis. The prudential re-

quirement that a litigant must have raised a matter before the Appeals Council in order to raise it in court is similar to this Court's general practice of declining to review a claim that was "neither raised before nor considered by" the lower court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Where a lower court actually addresses a question not raised by the parties, its resolution of the issue is subject to this Court's review. See, *e.g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). But the fact that a lower court has discretion to decide such questions, cf. *Kolstad* v. *American Dental Ass'n*, 119 S. Ct. 2118, 2127 (1999) ("The Court has not always confined itself to the set of issues addressed by the parties."), does not vitiate the application of waiver rules in a case where the lower court declines to exercise that discretion. The same principle applies here. If the Appeals Council grants review in a particular case and addresses a question not raised by the claimant, its resolution of the issue is reviewable in court. But where (as here) the Appeals Council denies review, issues not raised in the request for review will ordinarily be deemed to be defaulted, notwithstanding the fact that the Appeals Council *might* have chosen to resolve questions not pressed before it.[31]

4. Petitioner also contends (Br. 14) that the administrative default rule applied by the Fifth Circuit in this case will "add procedural complexity and formality to the SSA adjudicative process," in derogation of con-

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[31] Similarly, the Appeals Council may (and occasionally does) review an ALJ decision even though the claimant has not filed a request for review. See 20 C.F.R. 404.969. But if the Appeals Council does not choose to review a particular case *sua sponte*, the claimant's failure to file a request for Appeals Council review will bar any effort to obtain relief in court.

gressional intent. In a similar vein, the Seventh Circuit suggested that application of administrative default principles in this setting would "compel disappointed applicants for disability benefits to bombard the Appeals Council with full briefs in order to preserve their right to judicial review." *Johnson*, 189 F.3d at 563. That fear is groundless. Even a very short and relatively inartful statement of the grounds for review is sufficient, so long as the claimant's filing identifies the purported flaws in the ALJ's disposition of the case, thereby enabling the Appeals Council to focus its attention on those aspects of the ALJ decision with which the claimant disagrees. Application of the standard procedural default rule in this setting does not require that claims be presented in a legally sophisticated manner, or otherwise disturb the relatively informal character of the Appeals Council proceedings.

The *Johnson* court was wrong in any event to substitute its views for those of the agency regarding the manner in which SSA's administrative process can most efficiently be implemented. SSA's invocation of administrative default principles in courts around the country (see pp. 36-37, *supra*) reflects the agency's view that, with respect to claimants who are represented during Appeals Council proceedings, such rules are consistent with the informal and non-adversarial character of the administrative process.[32] SSA's views regarding the essential character and adjudicatory requirements of a body that the agency itself has created are entitled to substantial respect from a reviewing court. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 462

[32] See also note 35, *infra* (describing SSA's plans to revise forms given to claimants' representatives to inform them of administrative default rule).

(1997) (a reviewing court should defer to an agency's interpretation of its own regulation, even where that "interpretation comes to [the court] in the form of a legal brief," so long as the brief "reflect[s] the agency's fair and considered judgment on the matter in question").[33]

D. Petitioner Had Fair Warning That Arguments Not Raised Before The Appeals Council Would Be Barred On Judicial Review

Petitioner contends (see Br. 42-49) that SSA has engaged in "misleading and deceptive conduct" regarding the consequences of a claimant's failure to raise particular claims before the Appeals Council. She argues that SSA's failure to provide adequate notice precludes application of administrative default principles. That argument is without merit.

1. In determining the adequacy of notice in this setting, the question is whether a *represented* claimant may reasonably be charged with knowledge that the failure to raise an argument before the Appeals Council will effect a waiver of that argument in a subsequent judicial proceeding. Petitioner was represented by counsel both before the ALJ and before the Appeals Council. Assuming that application of an administrative default rule to her own lawsuit is fair and equitable, she cannot escape the consequences of her default by arguing that such a rule would be unfair as applied to *unrepresented* claimants. Moreover, as a

[33] As we explain above (see note 15, *supra*), the Seventh Circuit's error appears to have resulted in part from the court's misunderstanding of the government's acknowledgment that a failure to raise particular arguments before the Appeals Council is not, strictly speaking, a failure to "exhaust."

policy, the government has not invoked administrative default in suits brought by claimants who were unrepresented during the Appeals Council proceedings. See Supp. Pet. App. C2; Gov't Br. in Opp. 9. The Court's inquiry should accordingly focus on whether petitioner's attorney had adequate notice that the failure to raise particular claims before the Appeals Council would bar their subsequent assertion in court.[34]

2. Petitioner contends (Br. 44) that SSA has misled claimants "by advertising an informal, non-adversarial Appeals Council process, by encouraging claimants to present their issues in a three-line space, and by failing to provide an issue waiver warning along with the other appellate review warnings in the notice of unfavorable ALJ decision." To take the last point first: As we explain above, the rule that objections not presented to an administrative agency will thereafter be deemed waived is a firmly established background principle of administrative law. The essential attribute of a background rule is that it is assumed to apply absent some clear indication to the contrary. The agency's "fail[ure] to provide an issue waiver warning" (Pet. Br. 44) therefore could not reasonably have led petitioner's counsel to conclude that issues not preserved before the Appeals Council could thereafter be pressed in court.[35]

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[34] Petitioner is accountable for her attorney's acts and omissions. See, *e.g.*, *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 396-397 (1993). Cf. *New York* v. *Hill*, 120 S. Ct. 659, 664 (2000) ("decisions by counsel are generally given effect as to what arguments to pursue"); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990) (attorney's knowledge of agency action commencing 30-day period for filing suit is properly attributed to client).

[35] The ALJ's Notice of Decision expressly informed petitioner that "[i]f you do not appeal and the [Appeals] Council does not review [the ALJ's] decision on its own motion, you will not have a right to court review." J.A. 27. As the Court explained in *Salfi*, Congress has authorized SSA to decide what avenues of administrative review must be exhausted in order to obtain a "final decision of the Commissioner" subject to judicial review under 42 U.S.C. 405(g). See *Salfi*, 422 U.S. at 766 ("The term 'final decision' is not only left undefined by the Act, but its meaning is left to the [Commissioner] to flesh out by regulation."). Because the requirement that disability claimants seek Appeals Council review before pursuing judicial remedies is the direct result of an SSA-specific regulation, it is particularly appropriate for SSA to give claimants express notice of that requirement. By contrast, the administrative default rule that we advocate here is not specific to the SSA; it simply reflects the application to disability cases of general principles of administrative law. The absence of explicit, individualized notice of that background rule cannot reasonably be taken to suggest that the normal rule would not apply.

As we explained in our brief at the petition stage (see Gov't Br. in Opp. 11-12), SSA has informed us that it intends to amend the form that claimants and their representatives must file in order for the agency to recognize someone other than the claimant as acting on the claimant's behalf in matters before the agency. The revised form will advise the claimant's representative that the failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency's decision. Contrary to petitioner's assertion (Br. 47-48), however, the agency's decision to amend the form does not suggest that the relevant principles of administrative law were previously inaccessible to claimants and their counsel.

Rather, the question is whether counsel could reasonably have construed SSA regulations and agency practice as affirmatively recognizing an exception to the presumptive rule of administrative law.

For the reasons stated at pages 37-40, *supra*, neither the informality nor the non-adversarial character of Appeals Council proceedings is in any way inconsistent with principles of administrative default. The SSA regulations do not prevent or discourage the claimant

and her attorney from making a forceful challenge to the adverse decision of the ALJ. To the contrary, the regulations specifically provide that the claimant is free to submit "[a]ny documents or other evidence [she] wish[es] to have considered * * * with [her] request for review." 20 C.F.R. 404.968(a). The regulations specify the criteria ordinarily applied by the Appeals Council in determining whether to grant review, see 20 C.F.R. 404.970, and the notice of the ALJ's decision sent to petitioner and her attorney stated that "[t]he Council will review your case if one of the reasons for review listed in our regulations exists." J.A. 26-27. An awareness of the informal, non-adversarial character of the Appeals Council process therefore could not reasonably cause the claimant or her attorney to believe that ordinary rules of administrative default are inapplicable in this setting.

There is also no basis for petitioner's suggestion (Br. 43) that the three lines provided on Form HA-520 (see note 11, *supra*) for stating objections to the ALJ's decision misled her into believing that particular challenges need not be raised before the Appeals Council in order to be preserved for judicial review. In the first place, Form HA-520 is not the exclusive means of requesting Appeals Council review. SSA regulations provide that a request for Appeals Council review "may be made on Form HA-520 * * * or by any other writing specifically requesting review." 20 C.F.R. 422.205(a); see also 20 C.F.R. 404.968(a) ("You may request Appeals Council review by filing a written request."). The ALJ's Notice of Decision in this case similarly made clear that petitioner could request Appeals Council review either by using Form HA-520 or by "writ[ing] a letter." J.A. 25. Since petitioner's counsel did not submit a Form HA-520, but instead

invoked the Appeals Council's jurisdiction by means of a lengthy and detailed letter (see J.A. 51-70), there is no reason to believe that counsel was in any way misled by the contents of that Form.

In any event, Form HA-520 itself requires the claimant to identify the grounds for his challenge to the ALJ decision. The Form states: "I request that the Appeals Council review the Administrative Law Judge's action on the above claim because:" (item 5). The fact that only three lines are provided for the claimant's response indicates that a very brief explanation of the grounds for appeal may suffice and, in any event, a claimant could attach an additional sheet if she believed that was necessary. The Form does not suggest, however, that Appeals Council proceedings are an exception to the generally applicable requirement that one who invokes the jurisdiction of an appellate tribunal should identify the alleged error(s) in the decision from which the appeal is taken.

3. Petitioner's claim of unfair surprise is particularly unpersuasive in light of the Fifth Circuit's prior decision in *Paul* v. *Shalala*, 29 F.3d 208 (1994). The court issued its decision in *Paul* more than 19 months before petitioner filed her request for review in the Appeals Council. See *ibid.*; J.A. 51. That decision gave petitioner and her attorney unambiguous notice that, at least within the Fifth Circuit, claims not raised before the Appeals Council would ordinarily be barred from subsequent judicial consideration. See 29 F.3d at 210-211. Thus, any uncertainty that might otherwise have existed regarding the applicability of administrative default principles in this setting was dispelled by the ruling in *Paul*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

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